89-793

Supreme Court, U.S.
FILED
NOV 13 1989
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESTON STRAUCH,
Petitioner,

against

GATES RUBBER COMPANY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state has announced its critical concern with promoting public safety in the storage, handling or transportation of hazardous or toxic substances and has specifically provided for exemplary damages if a defendant's wanton or reckless disregard therefor causes injury, and when the state's supreme court has not addressed the issue, should a federal court, without either availing itself of the state's procedure for submitting certified questions to its highest court or considering the state's rules of construction, related laws, intermediate appellate court decisions on the law at issue, or interpretations of analogous laws, decide that manufacturers of products marketed expressly as vessels for transporting, handling or storing hazardous materials can not be held responsible for such damages?

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OCTOBER TERM, 1989

WESTON STRAUCH,
Petitioner,

against

GATES RUBBER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Weston Strauch, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 15, 1989.

OPINIONS BELOW

The decision of the United States Court of Appeals for

the Fifth Circuit is reported at 879 F.2d 1282 (5th Cir. 1989), and is set out at la-13a of the Appendix. The January 6, 1988 and April 30, 1986 unreported oral opinions and judgments of the United States District Court for the Eastern District of Louisiana, are set out at 14a-22a and 23a-26a of the Appendix, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1987. This Court has jurisdiction to review that judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND ARTICLES INVOLVED

LA. CIV. CODE ANN. art. 2315.3 (West 1989) provides:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

LA. REV. STAT. ANN. § 13:72.1(A)(West Supp. 1983) provides:

> The supreme court of this state may, by rule of court, provide that when it shall appear to the Supreme Court of the United States, or to any court of appeals of the United States, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are

determinative of the said cause, and there is no clear controlling precedent in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state may, by written opinion, answer.

LA. SUP. CT. R. XII provides in pertinent part:

Section 1. When it appears to the Supreme Court of the United States, or to any circuit court of appeals of the United States that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.

Section 2. The provisions of this rule may be invoked by the Supreme Court of the United States or any circuit court of appeal of the United States upon its own motion or upon the suggestion or motion of any interested party.

STATEMENT OF THE CASE

Refrigeration Equipment Company, Inc. ("Refrigeration Equipment") provides small quantities of anhydrous ammonia to some of its customers. From a large tank of ammonia at its shop, Refrigeration Equipment fills customers' smaller canisters. The liquid is transferred from the storage tank through hose designed, manufactured and sold for the specific purpose of transporting anhydrous ammonia. Refrigeration Equipment purchases such hose both for its own use and for use by its customers from a Gates Rubber Company ("Gates") distributor.

In September, 1980, Refrigeration Equipment purchased a length of Gates 1/2 inch Type 73 BHB Anhydrous Ammonia hose. The hose did not carry any notice that it could safely be used for only a limited time. Refrigeration Equipment was not provided with any literature regarding special care or maintenance of the hose. Nor was it provided with any warning that the product should be discarded and replaced when it was no more than 30 months old.

This hose was used by Refrigeration Equipment as the conduit for transporting ammonia from its storage tank to customers' cylinders. On the morning of June 28, 1985, Eugene Smith, a Refrigeration Equipment employee was filling canisters from the tank when the hose burst, permitting ammonia to escape.

Weston Strauch, the president of Refrigeration Equipment, was walking to work that morning. He was about one-half

block away when he noticed some commotion in front of Refrigeration Equipment's office and shop. He hurried to the shop, saw a cloud of ammonia hovering in the air, asked what had happened, and learned that the ammonia hose had burst. Fearing a large scale disaster, Mr. Strauch grabbed a gas mask and darted into the cloud to reach the main tank valve. He succeeded in stopping the flow of ammonia, but sustained chemical burns from the spray of the liquid.

Mr. Strauch filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, on January 10, 1986, seeking damages for injuries he received when the Gates hose burst. Mr. Strauch alleged that Gates was negligent in designing, manufacturing, and distributing the hose, and that the hose was unreasonably dangerous in normal use due to Gates' failure to warn hose users of the hose's limited safe service life. Because his injuries had resulted from Gates' wanton and reckless disregard for public safety in the handling and transport of the hazardous substance anhydrous ammonia, Mr. Strauch requested exemplary damages pursuant to article 2315.3 of the Louisiana Civil Code.

Gates removed the case to the United States District Court for the Eastern District of Louisiana, and prior to answering the suit filed a motion to dismiss the exemplary damages claim. It urged that because Gates did not deal in hazardous waste, it could not be subject to exemplary damages. Mr. Strauch opposed the motion, urging that his complaint sufficiently stated a claim under article 2315.3. On April 30, 1986, Gates' motion was granted. Prior to trial of the case, two state

court interpretations of article 2315.3 clarified that the article was not limited to persons dealing in hazardous waste. Mr. Strauch asked that the court reconsider the 12(b)(6) dismissal. His request was granted, but on January 7, 1988, the court reinstated its earlier dismissal, suggesting that the Court of Appeals might certify the question to the Louisiana Supreme Court.

Trial of the compensatory damages claim was held before a jury beginning April 25, 1988. Three days later, the jury returned a verdict finding that the hose was unreasonably dangerous in normal use. Further, the jury found that the unreasonably dangerous condition of the Gates hose had caused Mr. Strauch's injuries and awarded him damages.

Both parties appealed to the United States Court of Appeals for the Fifth Circuit. Mr. Strauch sought reversal of the lower court's 12(b)(6) dismissal, urging that under article 2315.3, a manufacturer of a product intended and marketed solely for use in the transportation, storage, or handling of a hazardous substance may be subject to exemplary damages if the manufacturer's reckless or wanton disregard for public safety has resulted in a product failure. In his Original Brief, Mr. Strauch urged that the question be certified to the Supreme Court of Louisiana. Mr. Strauch's request was reurged in his Reply Brief and during oral argument before the Fifth Circuit.

On August 15, 1989, the Court of Appeals affirmed the judgment of the trial court in all respects.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED WHEN, WITHOUT COMMENT, IT REJECTED PETITIONER'S SUGGESTION THAT AN UNDECIDED, IMPORTANT AND DISPOSITIVE ISSUE OF LOUISIANA LAW SHOULD BE CERTIFIED TO THE SUPREME COURT OF LOUISIANA FOR INITIAL DECISION

In our federal system, important and controlling issues of state law should initially be decided by state, not federal, courts. *Elkins v. Moreno,* 435 U.S. 647, 662, (1978)(majority opinion), and 435 U.S. at 677-78, (Rehnquist, J., joined by Burger, C. J., dissenting on other grounds). For fifteen years, this Court has viewed certification as a valuable means of promoting comity and simplifying abstention analysis. *Lehman Bros. v. Schein,* 416 U.S. 386, 390-391 (1974); *Bellotti v. Baird,* 428 U.S. 132, 151 (1976). Certification is particularly appropriate when the question involved is novel and state law on the subject is greatly unsettled. *Lehman Bros.*, 416 U.S. at 390-91. [1] Because the state

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[1] In *Lehman Bros.*, Justice Douglas went on to write that when federal judges from one state consider the law of another state, they are burdened with the difficulty of being "outsiders" who lack common exposure to the local law. 416 U.S. at 391. See also *Exxon Co. v. Banque de Paris et des Pays-Bas,* 867 F.2d 1524, 1527 (5th Cir. 1989)(Garza, J. dissenting from need to certify question). Although all members of the Fifth Circuit decide questions of Louisiana law on occasion, no member of the panel that considered this case is from Louisiana. When this fact is considered in conjunction with Louisiana's unique civilian system and its inclusion in the minority of states (only 4) which disallow punitive or exemplary damages as a general matter, the appropriateness of certification of this question becomes compelling.

law issue presented by this case is of precisely the type for which an available certification procedure should be and traditionally is employed, this Court should issue a writ to determine whether the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision." Sup.Ct.R. 17.1(a).

A. The State of Louisiana Has Declared that Ensuring Public Safety When Hazardous or Toxic Substances Are Stored, Handled or Transported Is a Matter of Critical State Concern

In *Elkins v. Moreno* this Court declined "to defer to a construction of state law made by a district court and affirmed by a court of appeals whose jurisdiction include[d] the State whose law [was] construed" because the question involved was one of great importance and high interest to the State of Maryland. 435 U.S. at 662 n.16. Similarly, the Fifth Circuit has certified questions to state courts in "cases where important, probably recurrent state issues are involved." Brown, *Certification — Federalism in Action,* 7 CUMB.L.REV. 455, 457 (1977). Tort remedies, including awards of exemplary damages, traditionally have been deemed of great local importance. *Silkwood v. Kerr -McGee Corp.*, 464 U.S. 238, 248 (1984).

Louisiana has voiced loudly its concern that reckless or wanton conduct on the part of those involved in the handling, transportation, or storage of hazardous materials may harm the state's citizens and its environment. In the Louisiana Environmental Quality Act, the state legislature declared that "the purity

of the air in the environment is a matter of vital concern to the welfare of the people of the state." LA. REV. STAT. ANN. § 30:2052 (West 1989). Similarly, in the Hazardous Materials Transportation and Motor Carrier Safety Act, the state legislature expressed concern "[t]hat the handling and movement of hazardous materials, because of their capacity for injury to human health, the environment, or property, poses a substantial danger to the health and safety of citizens of this state...." LA. REV. STAT. ANN. § 32:1501(2)(West Supp. 1989). A member of Louisiana's congressional delegation is currently sponsoring a measure that he says would "force the administration to adequately inspect, police and protect in terms of transportation of hazardous materials, as well as...provide strong penalties." U.S. Rep. Billy Tauzin, quoted in the Times-Picayune (November 8, 1989).

The inclusion of article 2315.3 in the Louisiana Civil Code demonstrates the importance with which the state views this question. Louisiana jurisprudence has long disallowed awards of exemplary damages in civil cases. *International Harvester Credit Corp. v. Seale,* 518 So.2d 1039, 1041 (La. 1988). In 1984, the civil code was amended to permit such awards in two types of cases: those in which the injuries were caused by a drunk driver's wanton or reckless disregard for the rights and safety of others, LA. CIV. CODE ANN. art. 2315.4, and those in which the plaintiff's injuries were caused by the defendant's reckless or wanton disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances, LA. CIV. CODE ANN. art. 2315.3. Under no other circum-

stances does Louisiana law provide for exemplary damages.

Having declined without comment to certify to the Louisiana Supreme Court the question of whether manufacturers of products marketed specifically and solely as vessels for transporting, storing or handling hazardous substances fall within the purview of article 2315.3, the Court of Appeals concluded:

> Whether it is ever appropriate to assess exemplary damages against the manufacturer of material that is used for the storage, handling or transportation of hazardous substances for the dangerous or reckless design of its product is a question not now before us. But if such relief is to be granted, it must have as its source some statute other than art. 2315.3.

Strauch v. Gates Rubber Co., 879 F.2d at 1288; App. 13a. Because no basis exists in the law of Louisiana except article 2315.3 for the assessment of exemplary damages, the question which the Court of Appeals framed was in fact before it. This critical issue of state law should be decided in the first instance by a Louisiana court.

B. The Issue of Whether Manufacturers Whose Conduct Is Reckless and Wanton May Be Liable for Exemplary Damages Under Louisiana Civil Code Article 2315.3 Is Recurrent and Affects Thousands of Litigants in Pending Cases

As Chief Judge Brown pointed out in the above cited law review article, a second factor courts should consider in determining whether to certify a question is the likelihood that the

issue will recur. In *Barnes v. Atlantic and Pacific Life Insurance Co. of America*, 514 F.2d 704, 706 (5th Cir. 1975), the Court of Appeals declared: "It is precisely these ordinary repetitive contract interpretations which, because of their recurring nature involving literally hundreds of contracts with many public policy factors affecting the welfare of local citizens, call for unequivocal resolution by the final court." Other courts, including this one, and commentators have agreed. *E.g., Elkins* , 435 U.S. at 662; *Retail Software Services, Inc. v. Lashlee* , 838 F.2d 661, 662 (2nd Cir. 1988), *certification refused*, 71 N.Y. 2d 788, 525 N.E. 2d 737, 530 N.Y.S. 2d 91 (1988), *decision on merits*, 854 F.2d 18 (2d Cir. 1988); 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 (1988).

Although the issue posed by the present case may be narrowly drawn to include only those manufacturers whose products are marketed specifically as mechanisms to store, handle, or transport hazardous materials, even that narrow question has and will continue to recur and affect numerous litigants. In *Stines v. Boston Industrial Products*, C.A.No. 87-2505, now pending in the United States District Court for the Western District of Louisiana, Shreveport Division, a motion for partial summary judgment is currently before the Honorable Judge Stagg. The facts in that case are almost indistinguishable from those in the case at bar. John Stines was sprayed with sulfuric acid, suffered third degree chemical burns, lost his left eye and most of his left ear, and was permanently scarred and disfigured when a chemical hose manufactured by the defendant, and advertised as a safe means of handling and transporting any of 600 chemicals, failed during use. In the absence of some action

by this Court, the Fifth Circuit's decision in the present case will require the district court to grant Boston Industrial Product's motion and foreclose Mr. Stines from presenting his claim for exemplary damages at trial.

Petitioner has listed in Appendix F the names and docket numbers of more than 90 other pending cases in which the question at issue is raised. All of the cases listed in Appendix F are suits arising from a single incident. On the morning of September 9, 1987, a railway tank car loaded with the chemical compound butadiene caught fire and burned in an area of New Orleans known as Gentilly. Thousands of residents have alleged that they suffered injury as a result of the escape of butadiene during that accident. Among the issues raised in that litigation is whether the manufacturer or manufacturers of the tank car acted in wanton or reckless disregard for public safety and may be held liable for exemplary damages. While many of the suits are pending in state court, at least five, collectively involving more than 100 individual plaintiffs, are on the docket of the United States District Court for the Eastern District of Louisiana. Those plaintiffs who, like Petitioner, are forced to litigate in federal court will not be permitted to go forward with their claims for exemplary damages due to the Fifth Circuit's ruling. Nonetheless, their neighbors who have succeeded in maintaining their suits in state court may be permitted to present the claims and may ultimately receive exemplary damages for injuries sustained in the same incident.

Due to the substantial presence in Louisiana of industries which use and produce hazardous and toxic substances, the

question presented by this case is likely to recur time and time again. The cumulative time and cost which numerous litigants will expend in relitigating this issue until it is resolved by the Louisiana Supreme Court can and should be avoided by asking that court to decide the issue now.

C. Because the Court of Appeals Lacked Sufficient Sources of State Law, Its Conclusion Was Conjectural

This Court has said that it will not disturb lower court interpretations of state law merely because an available certification procedure was not employed; the issue turns on whether the federal court could resolve the issue with available research materials already at hand. *Lehman Bros.*, 416 U.S. at 395. Thus, in *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir.), *cert. denied, 429 U.S. 829 (1976)*, the Court of Appeals announced that the most important factors to consider in determining whether to certify are the closeness of the question and the existence of sufficient sources of state law, such as statutes, judicial decisions and opinions of the state attorney general, to allow it to reach a principled rather than conjectural conclusion. Last year, the Second Circuit similarly ruled that certification was appropriate because the determination of the legislature's intent in enacting a statute was important to many persons in the state and without an interpretation from the state court there would be no sufficient sources of state law to allow the federal appellate court to make a principled decision. *Retail Software Services, Inc.*, 838 F.2d at 662.

The brief analysis of the exemplary damages issue in the Court of Appeals' opinion reflects the paucity of state law sources which it found useful in reaching its decision. The disputed codal provision itself is the sole authority cited. Apparently, the panel concluded that the decisions of two intermediate state appellate courts interpreting the article, the legislative history of the provision, similar codal provisions, and other state laws addressing hazardous and toxic substances had not addressed directly the manufacturers' liability question and could not be used by analogy to predict the result a state court would reach when faced with the issue. When a federal court reaches such a conclusion, and is faced with an important and probably recurrent issue of state law, the court should avail itself of the state's provision for certification.

D. Because All of the Judically Recognized Factors Weighing in Favor of Certification Are Present, the Petitioner's Request for Certification of the Issue Warranted Consideration

Other factors which federal courts routinely consider in deciding whether to enlist the available assistance of state courts also militate in favor of certification in the present case. Those factors include whether the existence "of disputed factual issues mak[es] it difficult or impossible to agree on what the legal questions are," and whether a party who has requested certification chose the federal forum. 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 (1988). Courts are skeptical of requests for certification from plaintiffs who have elected federal fora or from defendants who have removed cases to federal courts. *Colonial Park Country Club v.*

Joan of Arc., 746 F.2d 1425, 1429 (10th Cir. 1984); *Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1977); American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts, Official Draft* (1969).

The case at bar is devoid of disputed factual issues. Petitioner's claim for exemplary damages was dismissed under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. As the Court of Appeals recognized, "[f]or that order of dismissal to be appropriate, it must appear beyond doubt that plaintiff can prove no set of facts that would entitle him to the relief granted by art. 2315.3." *Strauch v. Gates*, 879 F.2d at 1287; App. 12a.

Nor did concerns about forum shopping affect the Fifth Circuit's decision. Petitioner filed this suit in state court. *See* Petition for Damages, App. 27a. Respondent removed the case on diversity grounds. *See*, Petition for Removal, App. 33a. Petitioner has vigorously defended his right to a trial on the exemplary damages issue: by first opposing Respondent's motion for partial dismissal; by next urging the trial court to reconsider its Order of Dismissal; by appealing the trial court's decision; and by requesting in his Original Brief to the Fifth Circuit, in his Reply Brief and again at oral argument before the Court of Appeals that any doubt as to the applicability of article 2315.3 be resolved by certification of the question to the Supreme Court of Louisiana.

Each and every factor which either this Court or any of the Courts of Appeals has identified as relevant in determining whether to take advantage of an available certification procedure weighs in favor of certification. The question of state law

presented by this case is a matter of serious state concern, is recurrent, and affects many litigants. The Court of Appeals implicitly rejected traditional state law source materials as not useful to the resolution of this issue. Petitioner has tenaciously sought to have this issue determined by the Louisiana Supreme Court. The opinion below does not reflect that the Court of Appeals ever considered employing Louisiana's certification procedure.[2] A writ of certiorari should issue.

II. THE COURT OF APPEALS' ASSESSMENT OF THE APPLICABILITY OF LOUISIANA CIVIL CODE ARTICLE 2315.3 WAS ERRONEOUS

After failing to grant Petitioner's request for certification, the Court of Appeals made its own determination that article 2315.3 was not applicable to Respondent's activities. In reaching that conclusion, the court was bound under the doctrine announced in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to view itself as an inferior Louisiana court and to decide the case as a state court faced with the issue would decide it. *DiPascal v. New York Life Insurance Co.*, 749 F.2d 255 (5th Cir. 1985). Because the court failed to employ the available legal sources and to determine how a Louisiana court would decide the issue of whether Petitioner's pleadings stated a cause of action for exemplary damages, this Court should issue a writ to

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[2] The trial court raised the possibility of certification of the issue by the Fifth Circuit. Transcript of Hearing on Plaintiff's Motion for Reconsideration, App. 14a. Because the Louisiana Supreme Court rules permit certification only by "the Supreme Court of the United States or any circuit court of appeal of the United States," the district court could do no more. LA. SUP. CT. R. XII(2); LA. REV. STAT. ANN. § 13:72.1 (West 1983).

review the Fifth Circuit's decision.

A. The Court of Appeals Declined to Consider Related or Analogous State Laws or Court Decisions in Its Analysis

As noted above in Part IC of this Petition, the appellate court employed no source of Louisiana law other than the disputed codal provision itself in analyzing the article's applicability to this case. Aside from its impact on the propriety of certification, that failing in a lower court's analysis violated the principle of *Erie*. In the absence of any specific guidance from the Louisiana Supreme Court, the Fifth Circuit should have looked to a variety of other sources to predict the state's law. Those sources include state court decisions in analogous situations, the state law reflected in related statutes, rules in other states, and such general legal sources as restatements, law review articles, and treatises. *Browning Seed, Inc. v. Bayles*, 812 F.2d 999 (5th Cir. 1987). Although both Petitioner and Respondent addressed such sources in their briefs, the court's opinion does not indicate that they were considered.

B. A Louisiana State Court Would Not Have Denied Mr. Strauch the Opportunity to Present His Claim for Exemplary Damages to a Jury

Louisiana's civil code provides general rules for the construction and interpretation of the state's laws. Following those rules, several courts have considered the scope of Louisiana Civil Code article 2315.3. Each of them has found that the

dispositive question in determining whether a claim for exemplary damages is stated in a given case is not the particular defendant's role in accomplishing the storage, transportation, or handling of a hazardous or toxic substance, but whether the plaintiff has alleged culpable conduct accompanied by reckless or wanton disregard for public safety. Louisiana courts recognize and promote the state legislature's will that the finder of fact should "decide whether the facts of the particular case justify the imposition of exemplary damages." *Bouy v. Transcontinental Gas Pipeline Corp.*, 645 F.Supp. 109 (M.D. La. 1986).

"When a law is clear and unambiguous...the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." However, "[w]hen the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." "Laws on the same subject matter must be interpreted in reference to each other." LA. CIV. CODE ANN. arts. 9-13. (West Supp. 1989).

The Court of Appeals cannot be said to have applied these basic principles in reaching its conclusion. Its analysis focused on the meaning of the word "in". The court suggested that Petitioner's pleadings could state a cause of action for exemplary damages only if "in the storage, handling or transportation" meant " 'relate[d] to' such storage, handling or transportation." The court rejected this interpretation and instead adopted Respondent's position "that art. 2315.3 requires the defendant to be 'engaged in' the storage, handling or transportation of a hazardous substance before its activities come within the pur-

view of the statute." *Strauch,* 879 F.2d at 1287; App. 12a.

Neither of the suggested phrases appears in article 2315.3. The Court of Appeals could not, therefore, have been applying the plain meaning of the text in accord with LA. CIV. CODE ANN. art. 9. The word "in" is:

> An elastic preposition...expressing relation of presence, existence, situation, inclusion, action, etc.; enclosed or surrounded by limits, as in a room; also meaning for, in and about, on, within etc.; and is synonymous with expressions "in regard to", "respecting", "with respect to" and "as is".

BLACK'S LAW DICTIONARY 683 (5th Ed. 1979). Giving the word "in" its ordinary meaning, a Louisiana court would conclude that Petitioner's complaint stated a cause of action for exemplary damages.

This conclusion would be further supported by an examination of the legislative history of article 2315.3. Representative Bradley who introduced and explained the bill said "what this bill does, it provides exemplary damages when there were injuries caused to persons and this would also be to property by the way, *with respect to* the storage, handling and transportation of hazardous or toxic substances when that injury was a result of wanton or reckless disregard for public safety." Discussion on House Bill No. 501, Excerpt of June 4, 1984 Committee Meeting, Louisiana House Committee on Civil Law and Procedure, at 2 (emphasis added).

No Louisiana court has limited the application of article 2315.3 to any particular class of individuals. In *Griffin v.*

Tenneco Oil Co., 531 So.2d 498 (La. App. 4th Cir. 1988), the intermediate appellate court for the jurisdiction in which Petitioner filed his suit specifically rejected the defendant's argument that the article did not apply to a party who had contracted with the plaintiff's employer. *Id.* at 500. The court refused to dismiss the plaintiff's claim prior to trial, and ruled that in order to prevail, "plaintiff must show that Tenneco's alleged acts and omissions of negligence were accompanied by a conscious indifference to consequences...." *Id.* at 501. In *Chinigo v. Geismar Marine, Inc.*, 512 So.2d 487, 490 (La. App. lst Cir.), *cert. denied, 514 So.2d 457 (1987)*, another Louisiana appellate court similarly ruled that the defendant's state of mind was the key issue in determining whether exemplary damages were warranted.

Decisions of Louisiana state courts interpreting analogous laws also indicate that a state court would not have dismissed Petitioner's claim. Louisiana's only other exemplary damage provision, Civil Code article 2315.4 provides:

> In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.

Affirming an award of exemplary damages against a drunk driver's employer in *Levet v. Calais & Sons, Inc.*, 514 So. 2d 153, 158 (La. App. 5th Cir. 1987), a Louisiana court said:

> As we view our duty in the present case, it is not to judge, as we are urged by the defendants, the philosophical pros and cons of assessing exemplary damages against one whose only liability for the injuries sustained is vicarious. We find Calais' liability was justified on the basis of its own culpable behavior, which we believe contributed to this accident: Richoux's supervisor bought the alcohol for their consumption on the drive home from work.

(footnote omitted). That analysis of a parallel provision adopted in the same legislative session as article 2315.3 reveals that Louisiana's state courts do not require a defendant's "active involvement in" the accident causing a plaintiff's injury before considering exemplary damages. The state courts emphasize the defendant's culpability in bringing about the accident.

Finally, the opinions of courts of other states support the analyses of Louisiana's intermediate appellate courts. In determining whether California's exemplary damages provision could apply to a manufacturer in *Grimshaw v. Ford Motor Co.*, 174 Cal. 348, 381 (Cal. App. 1981), the court looked for "conduct evincing 'a conscious disregard of the probability that the actor's conduct will result in injury to others.'" This language is almost identical to that of the Louisiana Fourth Circuit Court of Appeal in *Griffin*. Awarding exemplary damages, the California court went on to observe that:

> [I]n commerce related torts, the manufacturer may [otherwise] find it more profitable to treat compensatory damages as part of the cost of doing business rather than to remedy the defect. Deter-

> rence of such "objectionable corporate policies" serves one of the principle purposes of [California's exemplary damage provision].

Id. at 382.

The Fifth Circuit did not employ the tools ordinarily used to predict state law. Had it done so, it would have concluded that Petitioner had stated a cause of action for exemplary damages. This court should issue a writ of certiorari to review the analysis and conclusions of the Fifth Circuit and determine whether they represent an impermissable departure from *Erie* and its progeny.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Fifth Circuit.

DATED: NOVEMBER 13, 1989

Respectfully submitted,
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APPENDIX

APPENDIX A

Weston G. STRAUCH, Plaintiff-Appellee
Cross-Appellant,
v.
The GATES RUBBER COMPANY,
Defendant-Appellant
Cross-Appellee.

No. 88-3373.

United States Court of Appeals,
Fifth Circuit.
August 15, 1989.

Appeals from the United States District Court
for the Eastern District of Louisiana.

Before GEE, GARZA and JONES,
Circuit Judges.

GARZA, Circuit Judge:

In this products liability case, defendant urges that the evidence was insufficient to find that its anhydrous ammonia hose was unreasonably dangerous or that the alleged defect in the product was a proximate cause of plaintiff's injuries. Plaintiff cross appeals from the jury's finding of 60% comparative fault and from the trial court's dismissal of his claim for exemplary

damages under La. Civ. Code art. 2315.3. Because we find sufficient evidence to support all aspects of the jury's verdict and because we find, as well, that the district court properly dismissed plaintiff's claim for exemplary damages, we AFFIRM.

Plaintiff Weston Strauch is president of Refrigeration Equipment Company, which is engaged in the business of selling small quantities of anhydrous ammonia to some of its customers. From a large storage tank at its shop, plaintiff transfers the liquid ammonia to its customers' small canisters through a synthetic hose designed and manufactured by defendant Gates Rubber Company ("Gates"). The hose that is the subject of this lawsuit was purchased by plaintiff in September of 1989 from Gulf Belting and Gasket Company, a Gates distributor. It was accompanied by no notice that its useful life was limited to thirty months.

On the morning of June 28, 1985, Eugene Smith, a Refrigeration Equipment employee, was filling canisters with ammonia. At one point during the filling process, Smith's attention was diverted by a fellow employee. When he returned to his task, he realized that he had neglected to open a valve leading to the customer's canister. The resulting build-up of pressure caused the hose to burst, permitting ammonia to escape. According to expert testimony, the stress on the hose never surpassed its designated working pressure.

Weston Strauch was walking to work that morning when he noticed a commotion in front of his office. He ran to the shop, ascertained what had happened, donned a gas mask and ran into

the cloud of ammonia to reach the main tank valve. He succeeded in shutting down the flow of ammonia but sustained chemical burns on his legs, chest and arms in the process. He sued Gates on January 21, 1986 seeking compensatory and exemplary damages. His claim for exemplary damages was based on La. Civ. Code art. 2315.3 and upon an allegation that Gates was guilty of reckless and wanton disregard for public safety in the handling and transportation of a hazardous material.

The trial court granted Gates's partial motion to dismiss on the issue of exemplary damages. The remaining claims in the case were submitted to a jury, which found that the Gates hose was unreasonably dangerous because it carried no warning of its limited useful life. The jury also found that the failure to warn was a proximate cause of plaintiff's injuries. The jury then apportioned the fault for Mr. Strauch's injuries, assessing Gates and Refrigeration Equipment 20% each and finding Mr. Strauch 60% contributorily negligent. Plaintiff's injuries were valued at $15,000 plus $3,009.14 for medical expenses, the costs of which were apportioned according to each party's percentage of fault. Both parties appeal.

Discussion

Defendant Gates disputes the jury finding that it was even partially to blame for plaintiff's injuries. Gates points to evidence it claims is in the record to the effect that the employees of Refrigeration Equipment improperly subjected the hose to kinking, that they failed to protect the hose from excessive pressure and that they used the product in conjunction with

improper couplings and valves, all in contravention to the instructions and warnings supplied by Gates to Refrigeration Equipment.

Gates argues further that Strauch and his employees were sophisticated users of ammonia hoses and that they knew or should have known that their abuse of the hose, over time, might cause it to rupture. According to defendant, the combined negligence of both plaintiff and Eugene Smith were the sole cause of Mr. Strauch's injuries thus requiring that recovery against Gates, under Louisiana comparative fault principles, be reduced to zero.

Finally, Gates urges that the district court properly dismissed plaintiff's claim for exemplary damages. Louisiana statute permits recovery of exemplary damages "if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances." La. Civ. Code art. 2315.3. The trial court found that Gates neither stored, handled nor transported the ammonia that injured the plaintiff.

The gravamen of plaintiff's argument is that sufficient evidence was presented at trial for the jury to conclude that Gates's failure to warn Refrigeration Equipment of the limited safe and useful life of the hose rendered the product unreasonably dangerous. He also urges that there was sufficient evidence for the jury to find that Gates's failure to warn was a proximate cause of Strauch's injuries.

In addition, plaintiff assigns error to the trial court's reduc-

tion of his damage award through the apportionment of 60% fault to Strauch and 20% fault to Refrigeration Equipment. He argues that Louisiana's comparative fault doctrine does not apply to a strict product liability case such as this one.

Plaintiff also argues that the district court improperly granted defendant's partial motion to dismiss on the issue of exemplary damages. Plaintiff claims that art. 2315.3, and the cases construing it, subjects a manufacturer, seller, purchaser or transporter of a mechanism intended to be used in conjunction with a hazardous substance, who recklessly or wantonly exposes the public to danger by ignoring a known defect in the product or mechanism, to liability for exemplary damages. Strauch urges that it was error for the district court to dismiss this aspect of his claim because his complaint sufficiently alleged conduct on the part of Gates which would permit a jury to award exemplary damages. We address first defendant's, then plaintiff's, arguments on appeal.

I.

Gates's first assignment of error alleges that there was insufficient evidence presented at trial that its anhydrous ammonia hose was defective. [1] For purposes of review, we treat this issue as an appeal from a denial of a motion for judgment notwithstanding the verdict. On a motion for judgment n.o.v., a

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[1] Gates moved for a directed verdict at the close of plaintiff's case-in-chief on April 27, 1988. This motion was granted in part and denied in part, leaving for the jury the question whether Gates's hose was defective due to the company's alleged failure to warn.

reviewing court will consider all of the evidence in the light, and with all reasonable inferences, most favorable to the non-moving party. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). An appellate Court is in no position to weigh conflicting evidence and inferences or to determine the credibility of witnesses; that function is within the province of the finder of fact. *Id.* at 374.

The jury found that the Gates Rubber anhydrous ammonia hose was defective because Gates knew of a particular danger associated with the use of its hose but failed to warn of this danger. Specifically, plaintiff/appellee proved to the jury that Gates failed to warn Refrigeration Equipment that its product had an average service life of thirty months. Mr. Johnny Rodriguez and Mr. Louis Nesser worked for Gulf Belting and Gasket Company, a distributor of Gates's anhydrous ammonia hose. Mr. Rodriguez testified at trial that, although there existed Gates Rubber catalogues on Gulf Belting premises, these catalogues were not given to customers as a matter of course or routine. Mr. Nesser testified that he never received any notice from Gates indicating that the company was placing a thirty-month warning on its anhydrous ammonia hose.

Gates points out that Mr. Rodriguez also testified that the catalogues were available at all times and that Mr. Strauch never requested any copies of them. Mr. Nesser stated his opinion at trial that he did not consider the Gates ammonia hose dangerous in normal use. Appellee urges that this evidence makes it plain that Weston Strauch received "information and catalogues detailing proper use and maintenance of the subject hose."

Even assuming that it was incumbent upon plaintiff to request a copy of the literature that should have been supplied along with Gates's product–a dubious proposition at best–this evidence can only be characterized as conflicting with other evidence elicited from this witness; the jury was free to believe any part of Mr. Rodriguez's testimony that it found credible. Furthermore, we fail to see how Mr. Nesser's opinion as to the dangers associated with normal use of the Gates ammonia hose was relevant to the issue whether Gates failed to warn that its product had a serviceable life of thirty months. Once again, we will not disturb a jury verdict based upon the weight of conflicting evidence.

Gates further argues that Weston Strauch was a sophisticated user of anhydrous ammonia hose whose knowledge absolved Gates Rubber of the duty to warn him of the dangers related to extended use of the product. The cases Gates cites do not assist this Court in determining the precise question here and we find the "sophisticated-user" defense unconvincing.

Gates cites *American Mutual Liability Ins. Co. v. Firestone Tire and Rubber Co.*, 799 F.2d 993 (5th Cir. 1986) for the proposition that the general rule regarding the obligation of a manufacturer to warn of the limitations associated with its product "'is without application in those instances wherein the party either knows or should know of the limitations and restricted capabilities of the article.'" *Id.* at 994 (quoting *West v. Hydro-Test, Inc.* 196 So. 2d 598 (La. App. 1967)). In the *American Mutual* case, the plaintiff was injured when he overinflated one of defendant's agricultural tires. There, however,

the manufacturer's warning against overinflation had been torn off of the product by one of plaintiff's fellow employees; thus, it was not the case that the defendant had failed altogether to warn of a known hazard. In addition, evidence presented at trial in *American Mutual* revealed that the plaintiff had previously mounted hundreds of agricultural tires that warned against overinflation. Here, there was no undisputed evidence that anyone at Refrigeration Equipment had ever been warned that Gates's anhydrous ammonia hose had a service life of thirty months.

In *Bradco Oil & Gas Co. v. Youngstown Sheet and Tube Co.*, 532 F. 2d 501 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095, 97 S.Ct. 1111, 51 L.Ed. 2d 542 (1977), also cited for support by Gates, an oil well that had been drilled by Bradco had to be abandoned when a section of underground metal tubing manufactured by Youngstown fractured at a depth of 1500 feet. The evidence at trial revealed that the presence of hydrogen sulfide ("H_2S") at the well-site had embrittled the tubing. Bradco argued that Youngstown had a duty to warn the purchasers of its product that the tubing could be dangerous when used in wells containing even trace amounts of H_2S. However, it was established at trial that the hazards of H_2S embrittlement were widely known in the industry and that it was even common practice for drilling companies to utilize a "smell test" for the detection of H_2S odor at a well site. This Court declined to require Youngstown to warn the oil industry that the smell test was an inadequate means to assure safe use of its product in a known hazardous environment.

The case at bar is quite different from *Bradco*. The hazard

associated with use of the product in *Bradco* was widely known and understood in the industry as a whole and by the plaintiff in particular. The relevant hazard associated with the anhydrous ammonia hose in the case at bar was its use for a longer period of time than thirty months. Although, as Gates points out, any knowledgeable user of its hose would understand that the product could not be used forever, thirty months is a considerably shorter time than forever. Nothing in the record indicates that even a sophisticated user of anhydrous ammonia hose would know, without having received Gates's warning, that it should be replaced after thirty months.

With respect to Gates's argument that the jury erred in concluding that the failure to warn was a proximate cause of plaintiff's injuries, there was expert testimony presented at trial that, at the time of the accident, the hose was not subjected to stress over and above the manufacturer's recommended working pressure. It was reasonable for the jury to conclude from this evidence that the hose failed on June 28, 1985 because it had been in service longer than its useful life and that defendant's failure to warn of its product's truncated serviceable life was a proximate cause of its failure.

II.

We turn now to the issues presented in plaintiff's cross appeal. Weston Strauch argues that the special jury verdict form impermissibly allowed the apportionment of fault for this accident among Gates, Refrigeration Equipment and Mr. Strauch himself. Plaintiff cites *Bell v. Jet Wheel Blast*, 462 So.2d 166

(La. 1985) for support.

In the *Bell* case, the Louisiana Supreme Court answered in the negative a question certified by this Court inquiring whether the Louisiana Civil Code permits the defense of contributory negligence to be advanced in a strict products liability case. However, the supreme court concluded that, in an appropriate case, "comparative fault principles would seem to coincide with and further the goals of products liability doctrine." *Id.* at 171.

As plaintiff points out, the court stated that an appropriate case is one where:

> [T]he threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests... The recovery of a plaintiff who has been injured by a defective product should not be reduced, however, in those types of cases in which it does not serve realistically to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safe product.

Id. at 171-72.

The court explicitly declined to provide "an answer to all questions that may be expected to arise" in products liability cases, leaving to the trial judge "'broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in this opinion.'" *Id.* at 173 (quoting *Daly v. General Motors Corp.* 20 Cal.3d 725, 144 Cal.Rptr. 380, 390, 575 P.2d 1162, 1172 (1978)).

Weston Strauch testified at trial that his company, Refrigeration Equipment, was not in compliance with Occupational Safety and Health Administration requirements for the safe handling of anhydrous ammonia. Indeed, he expressed contempt for that agency and its regulations. We think it reasonable for the judge to have concluded that the injuries suffered by Mr. Strauch might have been avoided altogether had he brought his company into compliance with federal law prior to the date of this accident. One might hope that the reduction in his recovery, in accordance with the jury's assessment of his degree of fault, might provide the incentive for him to handle his anhydrous ammonia and the products associated with it more carefully in the future. In any event, we hold that the trial court did not erroneously submit the issue of comparative fault to the jury.

Plaintiff asserts that the trial court erroneously dismissed his claim for exemplary damages under La. Civ. Code art. 2315.3. This issue requires of us, as it did of the trial court, an inquiry into the applicability of art. 2315.3 to the activities of Gates Rubber.

Article 2315.3 provides:

In addition to general and special damages, exemplary damages may be awarded if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances.

The trial court granted Gates's partial motion to dismiss on the issue of exemplary damages. For that order of dismissal to be appropriate, it must appear beyond doubt that plaintiff can prove

no set of facts that would entitle him to the relief granted by art. 2315.3. *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir. 1985), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed. 2d 583 (1985).

Gates argues that art. 2315.3 requires a defendant to be "engaged in" the storage, handling or transportation of a hazardous substance before its activities come within the purview of the statute. Strauch urges that it is sufficient if the defendant's activities merely "relate to" such storage, handling or transportation. We think it clear that plaintiff's interpretation of art. 2315.3 reaches too far. Under plaintiff's view of the statute, for instance, the transportation of water to cool the fuel rods of a nuclear power plant "relates to" the storage, handling or transportation of a hazardous substance. However, we would have no difficulty, under such circumstances, concluding that no set of facts could be proved that would entitle a plaintiff to exemplary damages as against the transporter of water used to cool the fuel rods of a nuclear power plant. Water simply is not a hazardous substance under art. 2315.3 even though its transportation might "relate to" the handling of another substance considered hazardous.

The hazardous substance in question here is anhydrous ammonia. Article 2315.3, by its terms, requires that Strauch's injuries must result from Gates's wanton disregard for public safety in storing, handling or transporting anhydrous ammonia. The best that can be said for plaintiff is that Gates manufactures an instrumentality by which *others* might store, handle or transport anhydrous ammonia. Gates itself, however, engages in

none of those three activities. Whether it is ever appropriate to assess exemplary damages against the manufacturer of material that is used for the storage, handling or transportation of hazardous substances for the dangerous or reckless design of its product is a question not now before us. But if such relief is to be granted, it must have as its source some statute other than art. 2315.3.

For the foregoing reasons, we AFFIRM in all respects the decision reached below.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

WESTON G. STRAUCH	CIVIL ACTION
versus	NUMBER 86-269
THE GATES RUBBER COMPANY	SECTION "A"

APPEARANCES:

Harold B. Carter, Jr.	Montgomery, Barnett, Brown, Read, Hammond & Mintz 1800 First NBC Building New Orleans, Louisiana 70112 Attorney for Plaintiff
Craig R. Nelson	Hulse, Nelson & Wanek 610 Baronne Street New Orleans, Louisiana 70113 Attorney for Defendant

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(This matter came on for hearing on π's motion for reconsideration on Wednesday, January 6, 1988, in the courtroom, United States Court House, 500 Camp Street, New Orleans, Louisiana; HONORABLE CHARLES SCHWARTZ, JR., District Judge, presiding.)

PROCEEDINGS

MORNING SESSION

(Wednesday, January 6, 1988)

MR. CARTER: Good morning, Your Honor, Harry Carter representing Weston Strauch, the plaintiff in this case. I have a couple of things to add to what was in my memorandum. I would like to hand your clerk and have your clerk hand to you the minutes from the committee meeting where this particular statute was considered. (Counsel hands document to Deputy Nelson who hands it to the Court.)

What we are arguing here, of course, is that the statute applies equally to a defective product as to the owner of a defective product. And I call Your Honor's attention to the language on page 2 in the first large paragraph where it is stated that the statute applies with respect to the storage handling, et cetera, of hazardous product, not to the ownership of the facility.

Also, on page 3 at the top of the page where the arrow or should be located reference is made to defects or conditions. That's not the kind of thing that you refer to of ownership but of the manufacturer of a product. In the Chinengo case which we cited suppose the gaskets had been defectively manufactured and marketed for the purpose of carrying the hazardous product. Surely the statute would apply equally there as it did the owner who knew of the defect or knew the fact that the gaskets weren't manufactured for that purpose.

In this particular case the anhydrous hose, anhydrous ammonia is clearly a hazardous substance.

THE COURT: The hose is a hazardous substance?

MR. CARTER: No, the ammonia that it was --

THE COURT: There is no argument. You have spent a lot of time arguing. I had to read everything you said about the fact that they may have been negligent or terribly negligent. For the purpose of this motion, you can concede that. I got to presume that that's correct.

MR. CARTER: Okay.

THE COURT: So you have got reams of pages on that. That was unnecessary. The question is when you read this language of the statute as read, does it apply to a manufacturer of a hose? That's the whole simple thing.

MR. CARTER: What I wanted to say --

THE COURT: Let's take another example. I manufacture spark plugs, I manufacture spark plugs for many purposes. It goes into a truck that transports a hazardous substance. I didn't know it would ever spark, but I probably concede it would -- that manufacturer in my opinion under this statute is not liable. That's what I have so held and that's the position you are in and that's what I held before. And there isn't anything that you have cited to me that changes that from my original opinion.

MR. CARTER: There is one thing, Judge, and I wish I had brought the hose with me because it ain't like the spark plug. I

agree with completely this hose was designed solely for transport of anhydrous ammonia, and anhydrous ammonia hose is written on the side of the hose. It's designed for no other purpose.

THE COURT: When I go back to reading of the statute, I just don't think it applies. And the 5th Circuit is going to have to tell me I am in error. I have been through this. There isn't anything that you have submitted in this reconsideration in all these reams of material that affects my previous decision that I hadn't considered.

MR. CARTER: Judge, let me just --

THE COURT: I have just made up my mind. You can talk all you want. It is not going to make any difference. As I have said, I don't see anything that you have told me that I didn't know in my previous opinion.

MR. CARTER: Well, I don't want to irritate Your Honor, but I do want to speak for just a --

THE COURT: Go ahead.

MR. CARTER: The example you gave about the spark plug I, clearly nobody could dispute that. But let's go back to what the Louisiana Court did in Chinengo. Suppose that truck was designed and manufactured for the carrying of that particular product and the truck itself was defective, okay. That was the only product it was designed to carry, and the truck leaked the product and caused the same type of damage to the policeman that was caused in Chinengo. It is logical, Judge, to believe that the legislature intended that the defendant manufacturer not be

held liable but that the owner of the truck if he did something later to make it defective should be held liable?

THE COURT: I think that's very logical. I think that's very logical.

MR. CARTER: Well, then what about the rights --

THE COURT: Let's read the statute. I didn't write the statute; the legislature wrote the statute. Let's read the statute. That the plaintiff's injury was caused by the defendant with wanton disregard for public safety in the storage. Certainly weren't stored there--Gates wasn't storing it. Handling: They certainly weren't handling it. And they certainly weren't transporting it. That's what the statute says. If they meant something else, they should have said something else.

MR. CARTER: But in the minutes, Judge, that I just put before you --

THE COURT: I don't care what the minutes say. That's what the statute says, and I think the statute is unambiguous.

MR. CARTER: But the statute doesn't say engage in the handling and transportation; it says in the handling or transportation.

But look, Judge, these folks were in the transportation business. They -- what is the difference between this hose and a pipeline? Both of them were designed to transport a hazardous substance. That's what the Bowie case held. That's a pipeline case. Suppose the pipeline had been defectively made. Certainly that should not be the problem of the owner of it. It ought to be

the problem of the manufacturer of it. And the same is true here. There is very little difference between a pipeline except that it was made out of metal and this hose. And the hose again, Judge, is not a generic hose, it is made specifically for carrying anhydrous ammonia. Well, I think there is a vast difference.

THE COURT: There is a vast difference of opinion between you and me. That I will agree upon.

MR. CARTER: Yes sir, and you are the Judge.

THE COURT: No, I suggest that you read -- look, Article 13 of the Louisiana Civil Code says when a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. That's Civil Code Article 13. You can also look at Louisiana Revised Statutes §1.4 which states the same thing. I think the statute is perfectly clear, and I think what you are trying to do is twist it to meet an unfortunate situation. I mean we can argue about this. I have already gone through it once. You have asked me to reconsider. I have looked at what you asked me to reconsider. I said what you have asked me to reconsider doesn't change my mind.

MR. CARTER: Okay, Judge. I thought maybe I could.

THE COURT: You know something? On these motions to reconsider if you don't think I look at it hard the first time, you're wrong. You haven't cited anything really that changes the law and specifically changes what I relied upon the first time. You know, there is nothing in the rules of civil procedure which follows for a motion to reconsider.

MR. CARTER: I am aware of that.

THE COURT: You can look all you want. You won't find one. So I could just go ahead and say I am not going to hear it. I have listened to you. I have read what you have had to say. I have obviously done my homework. I don't agree with you, and you are still pursuing what I -- you may be right, but the 5th Circuit if they want to certify that back to the Louisiana Supreme Court, fine. But I don't believe that the plain meaning of the statute under the context of this case gives you the right to exemplary damages, and I have so held before. What was it, 1986 you all have pursued that matter?

The only thing that you have had which I presume was correct you could show or you had a real possibility of showing was that they were completely reckless in the manufacturer of this product. I don't think Mr. Nelson will agree with me. But presuming that's correct under the circumstances of a manufacturer of a hose, I do not think it fits. I don't even think it was intended. I don't think in the wildest dreams that they would have. If they would have said Gates could have been held liable under this statute, the legislature would have said yes. That's my opinion.

MR. CARTER: Judge, thank you for listening to me.

THE COURT: All right. I think we ought to get on this case and try it now. And if I'm wrong, we will try it again.

MR. CARTER: Yes, sir, Judge. Thank you.

MR. NELSON: I think I don't have anything, Judge.

THE COURT: If you said anything, you're liable to get in trouble.

(Hearing on motion concluded.)

REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter, United States District Court, Eastern District of Louisiana, the foregoing to be a true and accurate transcription of his Stenograph notes taken Wednesday, January 6, 1988.

New Orleans, Louisiana, this 1st day of February, 1989.

/s/

David A. Zarek

Official Reporter, Section "A"

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

WESTON G. STRAUCH	CIVIL ACTION
versus	NUMBER 86-269
THE GATES RUBBER COMPANY	SECTION "A"

APPEARANCES:

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(This matter came on for hearing on Δ's partial motion to dismiss on Wednesday, April 30, 1986, in the courtroom, United States Court House, 500 Camp Street, New Orleans, Louisiana; HONORABLE CHARLES SCHWARTZ, JR., District Judge, presiding.)

PROCEEDINGS

MORNING SESSION
(Wednesday, April 30, 1986)

DEPUTY NELSON: 86-269, Weston Strauch v. The Gates Rubber Company.

MS. FAY: Christina Fay on behalf of Gates Rubber Company, Your Honor. I really as this is pretty much a de novo issue I don't have too much to add to my memorandum except I have already said and take exception to the fact Gates manufactured hoses; it doesn't deal in non-toxic substances; it doesn't dispose of them.

THE COURT: I understand.

MS. LANDRY: Your Honor, Sylvia Landry representing the plaintiff, Weston Strauch. We do not have much to add to our memorandum either other than to point out to the Court that the line, which is 2315.1 does state the exemplary damages may be awarded if it is proven by the plaintiff. And I think we should be given the opportunity to prove our case under this statute.

THE COURT: All right. I disagree with you. I am going to grant the motion. I think you are trying to extend the statute by, there was no intent to extend that statute. I'm going to grant the motion denying the claim for punitive damages. We will proceed on the claim without punitive damages.

MS. FAY: Thank you, Your Honor.

MS. LANDRY: How many days, 10 days to file an answer on the rest?

THE COURT: All right, fine.

(Hearing on motion concluded.)

REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter, United States District Court, Eastern District of Louisiana, the foregoing to be a true and accurate transcription of his Stenograph notes taken Wednesday, April 30, 1986.

New Orleans, Louisiana, this 31st day of January, 1989.

/s/

David A. Zarek
Official Reporter, Section "A"

APPENDIX D

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 86-1088 DIVISION " " DOCKET NO.

WESTON G. STRAUCH
VERSUS
THE GATES RUBBER COMPANY

FILED: January 10, 1986 DEPUTY CLERK: _____

PETITION FOR DAMAGES

Now into court, through undersigned counsel comes Weston G. Strauch, a person of the full age of majority and domiciled in the Parish of Orleans and respectfully represents:

I.

The defendant herein is The Gates Rubber Company ("Gates"), a corporation duly organized, created and existing under and by virtue of the laws of the State of Colorado with its principal place of business at Denver, Colorado, which said defendant is authorized to do and is doing business in this State and Parish.

II.

The defendant, Gates, is indebted to petitioner in the sums

more particularly set forth below for the following reasons:

III.

Petitioner is the President of Refrigeration Equipment Co., Inc. ("Refrigeration"), a company engaged in the ammonia refrigeration business including the bottling of anhydrous ammonia in 100 and 150 pound cylinders, which cylinders are regularly filled in a fenced yard at Refrigeration's place of business located within the Parish of Orleans.

IV.

On the morning of Friday, June 28, 1985, Eugene Smith, an employee of Refrigeration, was preparing to load a 100 pound cylinder with anhydrous ammonia, when the connecting hose "bubbled" and burst.

V.

Ammonia fumes hit Mr. Smith in the face and the broken hose lay on the ground spewing anhydrous ammonia into the fenced area and filling the backyard of the business premises with a cloud of ammonia vapor.

VI.

Upon his arrival at work, petitioner observed Mr. Smith and the cloud-like vapor filling the backyard. After donning a gas mask, petitioner entered the fenced area, proceeded toward the tank, grabbed the broken hose and folded it in order to stop the flow of ammonia. While petitioner held the folded hose, another employee shut off the valve between the storage tank and the

hose, thereby stopping the flow of ammonia.

VII.

At the time of the above described anhydrous ammonia spill which gives rise to this action, the hose that burst allowing said ammonia to escape and cause injuries was a twelve (12') foot length of one-half (1/2") inch two (2) braid Type 73 BHB anhydrous ammonia hose which said hose was designed, engineered, manufactured, assembled, advertised and marketed by defendant, Gates.

VIII.

The anhydrous ammonia spill which gives rise to this litigation was caused by the negligence, imprudence and want of skill of Gates, its agents and employees in the following particulars without limitation:

A. In negligently, improperly and defectively manufacturing, assembling, engineering, designing and placing in commerce the aforesaid 73 BHB anyhdrous ammonia hose which was not fit or suitable for the purpose for which it was intended.

B. In failing to properly inspect and test the 73 BHB anhydrous ammonia hose prior to tendering the said hose to the public as suitable for the purpose for which it was intended.

C. In manufacturing, selling, assembling, engineering, designing and tendering for use the 73 BHB anhydrous ammonia hose which was defective and unfit for the use for which it was intended and which Gates knew or should have known was unreasonably dangerous for normal use and involved extreme

risk of injury to users of said hose and/or to third parties, which unreasonable dangers Gates should have anticipated could cause the injuries and damages complained of herein.

D. In negligently failing to warn or advise petitioner of the defective and dangerous condition of the 73 BHB anhydrous ammonia hose and of the hazards inherent in using the anhydrous ammonia hose in the defective condition complained of herein.

IX.

Petitioner avers that Gates should reasonably have anticipated that its negligent acts enumerated in the next preceding paragraph of this petition involved the risk of injury to users of the aforesaid ammonia hose and/or to third parties which could result in injuries and damages such as those which are the subject of this action. As a consequence of the foregoing, Gates is strictly liable unto petitioner for the damages specified herein.

X.

The anhydrous ammonia spill described above resulted in, among others, the following injuries:

Petitioner, Weston G. Strauch, received severe burns on a large portion of his upper right arm and the right side of his chest, and a large portion of the inside of his right thigh; and has suffered and will continue to suffer severe mental and emotional distress resulting from the injuries he received.

XI.

In addition to general and special damages, petitioner is entitle to exemplary damages pursuant to LA. CIV. CODE ANN. art. 2315.1 because of defendant's wanton and reckless disregard for the public safety in negligently and improperly placing in commerce the defective and dangerous 73 BHB anhydrous ammonia hose and further by failing to warn or advise complainant of the defective and dangerous condition of said hose which was to be used in the storage, handling and transportation of the hazardous and toxic substance, anhydrous ammonia.

XII.

Petitioner itemizes the damages resulting from the anhydrous ammonia apill and injuries described above as follows:

1. Past medical expenses $30,000.00
2. Future medical expenses $50,000.00
3. Past, present and future mental anguish, paid and suffering $300,000.00
4. Permanent scarring and residual injury .. $200,000.00
5. Exemplary damages $750,000.00
6. Loss of business income and reputation . $500,000.00

TOTAL $1,830,000.00

WHEREFORE, petitioner, Weston G. Strauch, prays:

1. That defendant, The Gates Rubber Company, be cited to appear and answer the above and foregoing petition after having been served with a copy of same;

2. That there be judgment in favor of Weston G. Strauch and against defendant, The Gates Rubber Company, in the full and true sum of ONE MILLION EIGHT HUNDRED THIRTY THOUSAND AND NO/100 ($1,830,000.00) DOLLARS, together with the legal interest thereon from date of judicial demand until paid;

3. That defendant, The Gates Rubber Company, be charged with all costs of these proceedings;

4. That petitioner have such other and further relief in the premises as in law and equity he may be entitled to receiver.

MONTGOMERY, BARNETT, BROWN,

READ, HAMMOND & MINTZ

BY: /s/
SYLVIA LANDRY

/s/
P. KEVIN COLOMB
1800 First NBC Building
New Orleans, Louisiana 70112-1799
Telephone: (504) 561-8989
Attorneys for Plaintiff

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WESTON STRRAUCH	CIVIL ACTION
VERSUS	No. 36-0943
GATES RUBBER COMPANY	SECTION: MAG.2

PETITION FOR REMOVAL

FILED: March 11, 1986 _____
DEPUTY CLERK

Defendant, Gates Rubber Company, files this petition for removal of this cause from the Civil District Court for the Parish of Orleans, State of Louisiana, in which it is now pending to the United States District Court for the Eastern District of Louisiana. This removal is predicated upon the court's diversity jurisdiction pursuant to Title 28, USC, Section 1332.

1. This case was commenced in the Civil District Court for the Parish of Orleans, State of Louisiana. Process was served on petitioner, along with a copy of plaintiff's petition for damages setting forth the claim for relief upon which this action is based. Process was served on petitioner on February 10, 1986. Thirty days have not expired since the service of plaintiff's petition upon the Gates Rubber Company.

2. The action is one of civil nature for damages.

3. The matter in dispute allegedly exceeds the sum of $10,000.00 exclusive of interest and costs as will more fully appear in the plaintiff's petition.

4. The Gates Rubber Company, as plaintiff's alleges, is a corporation incorporated and existing under and by virtue of the laws of the State of Colorado, with its principal place of business in Colorado.

5. Plaintiff, Weston G. Straunch, is a resident of and domiciled in the Parish of Orleans, State of Louisiana.

6. Defendant, Gates Rubber Company, files herewith a cash removal bond as required by 28 USC 1441, et sequel, in the amount of $250.00 and verifies the attached position and citation are true copies of the original filed in state court.

WHEREFORE, defendant, Gates Rubber Company, prays for removal of the above entitled cause from the Civil District Court for the Parish of Orleans, State of Louisiana to the United States District Court for the Eastern District of Louisiana.

New Orleans, Louisiana, March 4, 1986.

RESPECTFULLY SUBMITTED:

/s/

CRAIG R. NELSON
CHRISTINA P. FAY
HULSE, NELSON & WANEK
610 Baronne Street
New Orleans, LA 70113
(505) 524-6221

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WESTON STRAUNCH	CIVIL ACTION
VERSUS	NO.
GATES RUBBER COMPANY	SECTION

VERIFICATION

FILED: March , 1986 _____
DEPUTY CLERK

This is to verify that the attached Petition for Removal is an accurate reflection of the facts which entitles the Gates Rubber Company, to remove this case to the United States District Court for the Eastern District of Louisiana and that the attached pleadings represent all of the same which have been filed to date in the Civil District Court for the Parish of Orleans, State of Louisiana, known to mover.

RESPECTFULLY SUBMITTED,

/s/

CRAIG R. NELSON
CHRISTINA P. FAY
HULSE, NELSON & WANEK
610 Baronne Street
New Orleans, LA 70113
(504) 524-6221

SWORN TO AND SUBSCRIBED
BEFORE ME THIS _____ DAY
OF MARCH, 1986

/s/_____
NOTARY PUBLIC

APPENDIX F

OTHER CASES IN WHICH THE ISSUE IS RAISED[1]

Cases pending before the United States District Court for the Eastern District of Louisiana

Case	Docket No.
Leona Carter, et al v. GATC, et al	88-3979
Anthony F. Ehrhart, et al v. CSX, et al	88-4007
Cynthia Galjour, et al v. GATC, et al	87-5003
Frank Vaccarella, et al v. CSX, et al	88-0787[2]
Betty Zayred, et al v. CSX, et al	88-4393

Cases pending before the Civil District Court for the Parish of Orleans, State of Louisiana

Case	Docket No.
Jim Adams, et al v. CSX, et al	88-17895
Leonard Adams, et al v. CSX, et al	87-16374
Leonard Adams, et al v. NSC, et al	88-17788
Alvin Ageel Aedul-Salaam, et al v. CSX, et al	88-09411
Anastasia Age, et al v. GATX, et al	88-16824
Malinda Ailsworth, et al v. NSC, et al	88-17785

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[1] Petitioner does not suggest that this list is exhaustive. Because filings in most courts are not indexed according to the issues involved, it would be almost impossible to identify every case in which the liability of a manufacturer for exemplary damages is at issue.

[2] The original state court Petition in the Vaccarella case is included in this Appendix as an example.

Deidra Alford, et al v. CSX, et al	87-20956
Carol Anderson, et al v. GATC, et al	88-17363
Angela Antoine, et al v. CSX, et al	87-20462
Victoria Denise Arthus, et al v. CSX et al	88-07869
Peggy Banks, et al v. CSX, et al	88-17767
Barthelemy's Heating v. CSX, et al	88-17710
Terry Bartholomew, et al v. CSX, et al	88-17661
Arneska Bentley, et al v. NSC, et al	87-19552
Lamera J. Berger, et al v. NSC, et al	88-17901
Gustave J. Bethea, Sr., et al v. CSX, et al	88-12130
Carlita Bickham, et al v. CSX, et al	88-17706
Viola Blouin, et al v. CSX, et al	88-18039
Valerie Bocage, et al v. NSC, et al	88-17692
Marguerite Bozonier, et al v. NSC, et al	87-18084
Lucy E. Brister, et al v. CSX, et al	88-17135
Freeman Brown v. NSC, et al	87-20264
Helen Simson Brown, et al v. NSC, et al	88-17602
Sandra Scott Brown v. NSC, et al	87-23298
Eric Bunch, et al v. NSC, et al	87-17667
Frank Burke, et al v. NSC, et al	87-21574
Melvin Calendar, et al v. CSX, et al	88-17538
Rosemary Churchill, et al v. CSX, et al	87-21805
City of New Orleans v. CSX, et al	88-05279
City of New Orleans v. GATX, et al	88-17648
Edward Clouret, et al v. NSC, et al	87-23299
Dorthy Cooper, et al v. NSC, et al	88-17886
Marlene S. Davis, et al v. CSX, et al	88-15603
Charlotte Dejan, et al v. GATC, et al	88-17569
Bernadine Deroche, et al v. NSC, et al	88-03339

Lloyd Dominguez, et al v. CSX, et al	88-17237
Gloria Dreaux, et al v. GATC, et al	88-17728
Myra Dugue, et al v. NSC, et al	88-17951
Patrick Elmore, et al v. GATC, et al	88-16518
Margo A. Fairman, et al v. NSC, et al	88-17326
Willie Ferdinand, Jr., et al v. NSC, et al	88-17664
GATC v. CSX	88-17802
Elenora Gagliano, et al v. CSX, et al	88-17556
Thelma Gaines, et al v. CSX, et al	88-17413
Reverend Marie Galatas, et al v. NSC, et al	88-17902
Sheila Ingrid Givins, et al v. CSX, et al	88-16097
Wilfred Gouse, et al v. GATX, et al	88-00462
Government Employees v. Norfolk	88-5855
Cheryl Harvey, et al v. CSX, et al	88-17766
Michelle Haynes, et al v. NSC, et al	88-04620
Chester M. Henry, et al v. CSX, et al	88-17005
Sharon Hinton, et al v. CSX, et al	88-17894
Maxine Jackson, et al v. CSX, et al	88-17580
Shirley M. Jagers, et al v. CSX, et al	88-13333
Helena Javery, et al v. NSC, et al	88-16960
Fon Jee, et al v. NSC, et al	88-17872
Ellen Johnson, et al v. CSX, et al	88-12128
Helen A. Jones, et al v. GATX, et al	87-22918
Anna Rose Kennedy, et al v. CSX, et al	88-04955
Louis J. Koen, et al v. CSX, et al	88-17792
Phyllis Hallner Laney, et al v. CSX, et al	87-16928
Donald Lauredine, et al v. NSC, et al	87-23482
Gwendolyn Lewis, et al v. CSX, et al	87-16611
Silvia Lunkins, et al v. CSX, et al	88-16956

Eddie J. Mariani, et al v. CSX, et al	88-17831
Willie Dean Mark, et al v. CSX, et al	88-17893
Stanley McKenzie, et al v. CSX, et al	88-17421
Regina Medina, et al v. NSC, et al	88-04359
Arthur Mitchell III, et al v. NSC, et al	87-16818
Marguerite Moore, et al v. CSX, et al	88-17891
Phillip Morris, et al v. NSC, et al	88-17672
J. Shirley Murray, et al v. CSX, et al	88-17435
National Polyfab Corp. v. NSC, et al	87-22869
Wanda Parker, et al v. NSC, et al	87-17666
David Ragas, et al v. NSC, et al	88-17779
David Ramie, et al v. NSC, et al	88-16961
Athalia Rose, et al v. CSX, et al	87-21058
Mary L. Sandifer, et al v. NSC, et al	87-20210
Sathers, Inc. v. GATC	88-17167
Nathan Schaffer, Sr., et al v. NSC, et al	88-17783
Simmons Press, Inc. v. NSC	88-17576
Dwayne Sims, et al v. CSX, et al	88-16986
Malcolm Stewart, et al v. CSX, et al	88-17903
Henry Taylor, et al v. CSX, et al	88-17765
Alice Thomas, et al v. NSC, et al	88-17920
Alma Thomas, et al v. CSX, et al	88-17643
Alma Upton, et al v. CSX, et al	88-17776
Frank J. Vaccarella, et al v. CSX, et al	88-17798
Camille Walker, et al v. NSC, et al	88-15611
Elwood Walker, et al v. NSC, et al	87-20885
Rolando Wanton, et al v. NSC, et al	88-17574
Marion D. Williams, et al v. CSX, et al	88-17904
Betty Zayud, et al v. CSX, et al	88-17758

CIVIL DISTRICT COURT FOR THE

PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-17798 DIVISION K DOCKET NO.

FRANK J. VACCARELLA, CARLOS M. MAZA, BERNARD P. GRAISER, SR., SCOTT D. FENNER, DEBRA COFFEE, EGNIO J. CHONG, ANDREW J. BOURG, CONRAD J. BAKER AND DARRYL RIBET

VERSUS

CSX CORPORATION, CSX RAILWAY SYSTEM, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION, SOUTHERN RAILWAY COMPANY, LOUISIANA SOUTHERN RAILWAY COMPANY, NEW ORLEANS TERMINAL COMPANY, GENERAL AMERICAN TRANSPORTATION CORPORATION, GATX LEASING CORPORATION, GATX TERMINALS CORPORATION, MITSUI & COMPANY (USA), INC., ILLINOIS CENTRAL GULF RAILROAD COMPANY, PHILLIPS PETROLEUM COMPANY, PHILLIPS 66 COMPANY, POLYSAR LIMITED, POLYSAR, INCORPORATED; POLYSAR LATEX, AMERICAN MACHINE AND FOUNDRY COMPANY, AMF-BEAIRD, INC., AMF-BRD, INC., J.B. BEAIRD COMPANY, INC., LABORATORY SERVICE, INC., TIGER LEASING GROUP, NORTH AMERICAN CAR CORPORATION, GENERAL ELECTRIC RAIL CAR COMPANY AND NEW ORLEANS PUBLIC SERVICE, INCORPORATED

SUIT FOR NEGLIGENCE AND TOXIC TORT DAMAGES

TO THE HONORABLE, THE JUDGES OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA:

The joint petition of FRANK J. VACCARELLA, CARLOS M. MAZA, BERNARD P. GRAISER, SR., SCOTT D. FENNER, DEBRA COFFEE, EGNIO J. CHONG, ANDREW J. BOURG, CONRAD J. BAKER AND DARRYL RIBET, all full age residents of the Parish of Orleans, State of Louisiana, with respect represent:

1.

Made defendants herein are:

Defendant, CSX CORPORATION, and its subsidiaries, CSX RAILWAY SYSTEM and CSX TRANSPORTATION, INC., are foreign corporations organized under laws other than the State of Louisiana but doing business in this Parish and State, all of the State of Louisiana and all doing business in this Parish and State, all hereinafter referred to collectively as "CSX"; defendant, NORFOLK SOUTHERN CORPORATION, is a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, and its subsidiaries, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, SOUTHERN RAILWAY COMPANY and

LOUISIANA SOUTHERN RAILWAY COMPANY, both domestic corporations organized under laws of the State of Louisiana and all doing business in this Parish and State, all hereinafter referred to collectively as "SOUTHERN"; defendant, NEW ORLEANS TERMINAL COMPANY, a domestic corporation organized under laws of the State of Louisiana and doing business in this Parish and State, hereinafter referred to as "NOT"; defendant, GENERAL AMERICAN TRANSPORTATION CORPORATION, and its subsidiary, GATX LEASING CORPORATION, are foreign corporations organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to collectively as "GATX"; defendant, GATX TERMINALS CORPORATION, is a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to as "GATX TERMINALS"; defendant, MITSUI & COMPANY (USA), INC., is a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to as "MITSUI"; defendant, ILLINOIS CENTRAL GULF RAILROAD COMPANY, is a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to as "ICG"; defendant, PHILLIPS PETROLEUM COMPANY and its subsidiary, PHILLIPS 66 COMPANY, both foreign corporations organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to collectively as "PHILLIPS"; defendant, POLYSAR LIMITED and its subsidiaries, POLYSAR, INCORPORATED and POLYSAR LATEX, are all foreign

corporations organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to collectively as "POLYSAR"; defendant, AMERICAN MACHINE AND FOUNDRY COMPANY and its subsidiaries, AMF-BEAIRD, INC., AMF-BRD, INC. and J. B. BEAIRD COMPANY, are all foreign corporations organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter collectively referred to as "AMF"; defendant, LABORATORY SERVICE, INC., is a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to as "LAB SERVICES"; defendant, TIGER LEASING GROUP and its subsidiary, NORTH AMERICAN CAR CORPORATION, are both foreign corporations organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to collectively as "NACC"; defendant, GENERAL ELECTRIC RAIL CAR COMPANY, is a foreign corporation organized under laws other than the State of Louisiana but doing business in this Parish and State, hereinafter referred to as "G.E."; defendant, NEW ORLEANS PUBLIC SERVICE, INCORPORATED, is a domestic corporation organized under laws of the State of Louisiana and doing business in this Parish and State, hereinafter referred to as "NOPSI".

2.

That said defendants are jointly, severally, and in solido justly and truly indebted unto your petitioner in the full sum of

SEVEN MILLION AND NO/100 ($7,000,000.00) DOLLARS, together with legal interest thereon from date of judicial demand until paid, for exemplary damages and for all costs of these proceedings and for the following, to-wit:

3.

On or about September 9, 1987, at approximately 1:50 a.m., petitioners were assigned to the Special Operations Division, Tactical Unit Task Force of the New Orleans Police Department. Petitioners were dispatched to the area surrounding the 2300 block of Almonaster Street, the scene of a chemical explosion and fire.

4.

Petitioners allege that because of the explosion, fire and subsequent toxic fumes, they were required to evacuate the area, patrol the area for looters, vandals and sightseers and remain in the area for an entire thirty-six (36) hour period.

5.

Petitioners allege that the sole and proximate cause of the incident complained of was an ignition and/or explosion of a tank car containing 29,000 gallons of the chemical Butadiene which burned in an overgrown lot containing switching tracks approximately sixty yards east of Interstate 10.

6.

Petitioners allege that the sole and proximate cause of this incident was the negligence of one or more of the employ-

ees of defendants herein in the following respects:

CSX.

Plaintiffs allege that CSX was the owner of the interchange track where the tank car was taken and placed by CSX and/or other defendants prior to the explosion. CSX transported the car and product, had possession and control of the car, its product and the interchange track at the time of the explosion and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Failing to take effective action to prevent further leakage or explosion when it had ample opportunity to do so;

c) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner;

d) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

e) Failing to warn petitioners that a tank car filled with 29,000 gallons of the chemical Butadiene was in fact approaching the area;

f) Failure to exercise proper care on the basis of what it knew or should have known;

g) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

h) Other acts of negligence to be shown at the trial of this matter.

SOUTHERN

Plaintiffs allege that SOUTHERN was the carrier and transporter of the tank car and its product, from the GATX facility in Goodhope, Louisiana, to the CSX interchange track in New Orleans, Louisiana. SOUTHERN had possession and control of the tank car and product at all relevant times and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner;

c) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

d) Failing to warn petitioners that a tank car filled with 29,000 gallons of the chemical Butadiene was in fact approaching the area;

e) Violating various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

f) Other acts of negligence to be shown at the trial of this matter.

NOT

Plaintiffs allege that NOT took possession of the tank car at a connecting point and moved it to an interchange track near Music and Agriculture Streets on September 8, 1987. As transporter of the car and carrier of Butadiene, NOT had the obligation to determine that the tank car, appurtenances and fittings were in proper and safe condition for the transport and storage, and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner;

c) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

d) Failing to warn petitioners that a tank car filled with 29,000 gallons of the chemical Butadiene was in fact approaching the area;

e) Violating various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances:

f) Other acts of negligence to be shown at the trial of this matter.

GATX

Plaintiffs allege that GATX was the owner of the tank car

and responsible for insuring that the tank car was not defective and in proper working condition, and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner;

c) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

d) Failing to warn petitioners that a tank car filled with 29,000 gallons of the chemical Butadiene was in fact approaching the area:

e) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

f) Other acts of negligence to be shown at the trial of this matter.

GATX TERMINALS

Plaintiffs allege that GATX TERMINALS loaded the product, Butadiene, in the tank car and was responsible for the selection of the car prior to and after loading. Thereafter, GATX TERMINALS delivered the tank car to the ICG for transportation to the consignee, POLYSAR, and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Improperly and/or negligently loading the tank car with dangerous chemicals:

c) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner:

d) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

e) Failing to warn petitioners that a tank car filled with 29,000 gallons of Butadiene was in fact approaching the area;

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

g) Other acts of negligence to be shown at the trial of this matter.

MITSUI

Plaintiffs allege that MITSUI was lessee of the tank car and responsible for the shipment of the product from the GATX TERMINAL faculty in Goodhope, Louisiana, allegedly owned by CSX, to the consignee in Chattanooga, Tennessee. MITSUI contracted with GATX for loading the product and furnished the tank car. MITSUI, as shipper, had an obligation to determine that the tank car, appurtenances and fittings were in proper

condition, had a duty to ensure safe transport and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Improperly and/or negligently loading the tank car with dangerous chemicals;

c) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner;

d) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

e) Failing to warn petitioners that a tank car filled with 29,00 gallons of Butadiene was in fact approaching the area;

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

g) Other acts of negligence to be shown at the trial of this matter.

ICG

Plaintiffs allege that the ICG was the initial carrier and transporter of the tank car and its product to and from the GATX facility in Goodhope, Louisiana, and from Goodhope to the CSX interchange track in New Orleans, Louisiana. ICG had possession and control of the tank car and its product at all relevant

times and was negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Improperly and/or negligently loading the tank car with dangerous chemicals;

c) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner:

d) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas;

e) Failing to warn petitioners that a tank car filled with 29,000 gallons of Butadiene was in fact approaching the area;

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

g) Other acts of negligence to be shown at the trial of this matter.

PHILLIPS

Plaintiffs allege that PHILLIPS was the owner of the tank car from 1979 to approximately March, 1987. During this time PHILLIPS modified the seal and closure between the manway door and tank shell and was negligent in the following respects:

a) Failing to properly maintain the tank car in a proper and prudent manner;

b) Failing to properly install, modify and/or repair a gasket or seal;

c) Failing to properly install, modify and/or repair the manway and/or closure components of the manway;

d) Failing to properly inspect the tank car to assure that it was reasonably safe for the transportation of toxic and flammable chemicals Of the nature Of Butadiene;

e) Failing to install the proper gasket or seal for the use of the tank in the transportation of chemicals of the nature of Butadiene:

f) Failing to warn those it reasonably anticipated would use the tank car for the transportation of chemicals as to the type of gasket or seal and other closure components installed;

g) Failing to warn those it reasonably anticipated would use the tank car of any limitations applicable to the use of the tank car for purposes of transporting hazardous substances;

h) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances:

i) Other acts of negligence to be shown at the trial of this matter.

POLYSAR

Plaintiffs allege that POLYSAR was responsible for shipment from GATX TERMINALS in Goodhope, Louisiana, allegedly Owned by CSX, to the POLYSAR facility in Chattanooga, Tennessee. POLYSAR contracted with MITSUI to arrange loading and furnish the tank car. As shipper, POLYSAR had the obligation to determine the proper conditions of the tank car for safe transportation. POLYSAR, through MITSUI, represented to the rail carrier that the tank car was in proper condition. POLYSAR, through MITSUI, contracted with GATX for loading and negligent in the following respects:

a) Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car;

b) Improperly and/or negligently loading the tank car with dangerous chemicals;

c) Failing to properly inspect, supervise and maintain the railroad tracks and the tank car in a proper and prudent manner;

d) Failing to re-route a tank car with dangerous and toxic substances away from heavily populated areas:

e) Failing to warn petitioners that a tank car filled with 29,000 gallons of Butadiene was in fact approaching the area:

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances:

g) Other acts of negligence to be shown at the trial of this matter.

AMF

Plaintiffs allege that AMF was responsible for the manufacture of the tank car and was negligent in the following respects:

a) Negligent manufacture of a tank car to be utilized in the transportation of hazardous materials;

b) Defective design of a tank car to be utilized in the transportation of hazardous materials;

c) Failing to manufacture a tank car to be utilized in the transportation of hazardous materials as per specifications:

d) Failing to equip a tank to be utilized in the transportation of hazardous materials with a properly designed and approved manway cover and appurtenances;

e) Failing to warn those it reasonably anticipated would use the tank car for the transportation of hazardous materials of any limitations applicable to the use of the tank car for purposes of transporting hazardous materials;

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

g) Other acts of negligence to be shown at the trial of this matter.

LAB SERVICES

Plaintiffs allege that LAB SERVICES contracted with MITSUI and/or GATX and/or POLYSAR to survey the tank car and assure that it was in suitable condition for the transportation of hazardous materials, and was negligent in the following respects:

a) Failing to properly inspect the tank car to assure that it was in proper condition for receiving and transporting hazardous materials:

b) Improper treatment of the tank car which substantially weakened the tank and its components, making it more vulnerable to leakage;

c) Failing to warn those it reasonably anticipated would use the tank car for the transportation of hazardous materials of any limitations applicable to the use of the tank car for purposes of transporting hazardous materials;

d) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances:

e) Other acts of negligence to be shown at the trial of this matter.

NACC

Plaintiffs allege that NACC was the manufacturer of the tank car and was negligent in the following respects:

a) Negligent manufacture of a tank car to be utilized in the transportation of hazardous materials;

b) Defective design of a tank car to be utilized in the transportation of hazardous materials;

c) Failing to manufacture a tank car to be utilized in the transportation of hazardous materials as per specifications;

d) Failing to equip a tank to be utilized in the transportation of hazardous materials with a properly designed and approved manway cover and appurtenances;

e) Failing to warn those it reasonably anticipated would use the tank car for the transportation of hazardous materials of any limitations applicable to the use of the tank car for purposes of transporting hazardous materials;

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

g) Other acts of negligence to be shown at the trial of this matter.

G.E.

Plaintiffs allege that G.E. was the manufacturer of the tank car and/or the successor of other named defendants and negligent in the following respects,

a) Negligent manufacture of a tank car to be utilized in the transportation of hazardous materials:

b) Defective design of a tank car to be utilized in the transportation of hazardous materials;

c) Failing to manufacture a tank car to be utilized in the transportation of hazardous materials as per specifications;

d) Failing to equip a tank to be utilized in the transportation of hazardous materials with a properly designed and approved manway cover and appurtenances:

e) Failing to warn those it reasonably anticipated would use the tank car for the transportation of hazardous materials of any limitations applicable to the use of the tank car for purposes of transporting hazardous materials;

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances;

g) Other acts of negligence to be shown at the trial of this matter.

NOPSI

Plaintiffs allege that NOPSI was a utility provider in the area of the tank car explosion and was negligent in the following respects:

a) Failing to take effective action to prevent an ignition and/or explosion when it had ample opportunity to do so;

b) Failing to properly inspect, supervise and maintain utility service in the area of the Butadiene leakage;

c) Failing to warn petitioners that a condition existed which could cause ignition of leaking hazardous substances;

d) Failure to exercise proper care on the basis of what it knew or should have known:

e) Failing to halt utility service to an area which it knew, or should have known, was susceptible to ignition of flammable substances:

f) Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances:

g) Other acts of negligence to be shown at the trial of this matter.

7.

As a result of the personal injuries and other losses sustained by plaintiffs, defendants are liable unto plaintiffs for compensatory relief under the provisions of Louisiana Civil Code Articles 667, 2315, 2317 and 2324.

8.

Further, plaintiffs seek and are entitled to the recovery of exemplary damages under the provisions of Louisiana Civil Code Article 2315.3.

9.

Had defendants exercised the high degree of care imposed by law in the discharge of the duties therein, the incident would not have occurred. Plaintiffs assert the doctrine of res ipsa loquitur as to all defendants named hereinabove.

10.

Additionally and/or alternatively, due to the unreasonable risk of harm to plaintiffs presented by circumstances surrounding the incident, plaintiffs assert the strict liability provisions of Article 2317 of the Louisiana Civil Code.

11.

Further, additionally and/or alternatively, defendants are liable to plaintiffs pursuant to the provisions of Louisiana Civil Code, Article 667.

12.

Further, additionally and/or alternatively, plaintiffs allege that because of defendants' wanton and/or reckless disregard for public safety in the storage, handling, loading and transportation of hazardous or toxic materials, defendants are strictly liable under the provisions of Louisiana Civil Code Articles 2315 and 2315.3.

13.

Further, additionally and/or alternatively, defendants herein are liable under the provisions of Louisiana Civil Code Articles 2315 and 2324 for their negligence as enumerated hereinabove.

14.

Moreover, plaintiffs allege that their personal injuries and damages were caused by the defendants' wanton and/or

reckless disregard for the public safety in the storage, handling, loading and transportation of hazardous or toxic substances. Therefore, defendants are liable for exemplary damages under the provisions of Louisiana Civil Code, Article 2315.3.

15.

Because of the aforementioned accident and as a direct and proximate cause thereof, your petitioners sustained the following injuries and damages:

FRANK J. VACCARELLA

Sinus infection;

Respiratory congestion;

Dizziness;

Eye irritation;

Headaches;

Permanent sinus and respiratory injury;

Anxiety and emotional distress.

CARLOS M. MAZA

Skin irritation;

Eye irritation;

Headaches;

Dizziness;

Anxiety and emotional distress.

BERNARD P. GRAISER

Hacking cough;

Sinus irritation;

Sinus discharge;

Shortness of breath;

Headaches;

Anxiety and emotional distress.

SCOTT D. FENNER

Throat irritation;

Nausea;

Dizziness;

Headaches;

Sinus irritation;

Anxiety and emotional distress.

DEBRA COFFEE

Eye irritation;

Throat irritation;

Dizziness;

Nausea;

Headaches;

Anxiety and emotional distress:

Cancer phobia.

EGNIO J. CHONG

Throat irritation;

Headaches;

Nausea;

Dizziness;

Skin irritation;

Anxiety and emotional distress.

ANDREW J. BOURG

Sinus irritation;

Skin irritation;

Headaches;

Nausea;

Dizziness;

Anxiety and emotional distress.

CONRAD J. BAKER

Eye irritation;

Throat irritation;

Skin irritation;

Dizziness;

Nausea;

Headaches;

Anxiety and emotional distress.

DARRYL RIBET

Skin irritation;

Throat irritation;

Nausea;

Dizziness;

Headaches;

Permanent digestive injury;

Anxiety and emotional distress.

16.

Petitioners itemize their damages as follows:

FRANK VACCARELLA

Past, present and future medical	$ 25,000.00
Past, present and future loss wages	75,000.00
Pain and suffering	250,000.00
Emotional stress and strain	150,000.00
Permanent disability	500,000.00
Sub-Total	$1,000,000.00

CARLOS M. MAZA

Past, present and future medical	$ 10,000.00
Past, present and future loss wages	15,000.00
Pain and suffering	100,000.00
Emotional stress and strain	75,000.00
Sub-Total	$200,000.00

BERNARD P. GRAISER

Past, present and future medical	$ 10,000.00
Past, present and future loss wages	15,000.00
Pain and suffering	100,000.00
Emotional stress and strain	75,000.00
Sub-Total	$200,000.00

SCOTT D. FENNER

Past, present and future medical	$ 10,000.00
Past, present and future loss wages	15,000.00
Pain and suffering	100,000.00
Emotional stress and strain	75,000.00
Sub-Total	$200,000.00

DEBRA COFFEE

Past, present and future medical ..... $ 10,000.00

Past, present and future loss wages 15,000.00

Pain and suffering 100,000.00

Emotional stress and strain 75,000.00

Sub-Total $200,000.00

EGNIO J. CHONG

Past, present and future medical ..... $ 10,000.00

Past, present and future loss wages 15,000.00

Pain and suffering 100,000.00

ANDREW J. BOURG

Past, present and future medical ..... $ 10,000.00

Past, present and future loss wages 15,000.00

Pain and suffering 100,000.00

Emotional stress and strain 75,000.00

Sub-Total $200,000.00

CONRAD J. BAKER

Past, present and future medical	$ 10,000.00
Past, present and future loss wages	15,000.00
Pain and suffering	100,000.00
Emotional stress and strain	75,000.00
Sub-Total	$200,000.00

DARRYL RIBET

Past, present and future medical	$25,000.00
Past, present and future loss wages	75,000.00
Pain and suffering	250,000.00
Emotional stress and strain	150,000.00
Permanent disability	500,000.00
Sub-Total	$1,000,000.00
Exemplary damages	$3,600,000.00
Grand Total	$7,000,000.00

9.

Petitioners aver amicable demand upon defendants to no avail.

WHEREFORE, petitioners pray that a copy of this petition be served upon each defendant herein, that they be duly cited to appear and answer same and that, after all legal delays and due proceedings had, there be judgment herein in favor of petitioners, FRANK J. VACCARELLA, CARLOS M. MAZA, BERNARD P. GRAISER, SR., SCOTT D. FENNER, DEBRA COFFEE, EGNIO J. CHONG, ANDREW J. BOURG, CONRAD J. BAKER AND DARRYL RIBET, and against defendants, CSX CORPORATION, CSX RAILWAY SYSTEM, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION, SOUTHERN RAILWAY COMPANY, LOUISIANA SOUTHERN RAILWAY COMPANY, NEW ORLEANS TERMINAL COMPANY, GENERAL AMERICAN TRANSPORTATION CORPORATION, GATX LEASING CORPORATION, GATX TERMINALS CORPORATION, MITSUI & COMPANY (USA), INC., ILLINOIS CENTRAL GULF RAILROAD COMPANY, PHILLIPS PETROLEUM COMPANY, PHILLIPS 66 COMPANY, POLYSAR LIMITED, POLYSAR INCORPORATED, POLYSAR LATEX, AMERICAN MACHINE AND FOUNDRY COMPANY, AMF-BEAIRD, INC., AMF-BRD, INC., J.B. BEAIRD COMPANY, INC., LABORATORY SERVICE, INC., TIGER LEASING GROUP AND NORTH AMERICAN CAR CORPORATION, GENERAL ELECTRIC RAIL CAR COMPANY AND NEW ORLEANS PUBLIC SERVICE, INCORPORATED, in the full sum of SEVEN MILLION AND NO/100 ($7,000,000.00) DOLLARS, jointly, severally and in solido, together with legal interest

thereon from date of judicial demand until paid, for all costs of these proceedings, and for all general and equitable relief.

Respectfully submitted,

/s/ _____
CHARLES J. IMBORNONE
1627 St. Charles Avenue
New Orleans, Louisiana 70130
568-0480
Bar No. 14395
Counsel for Plaintiffs
FRANK J. VACCARELLA, ET AL

PLEASE SERVE:

CSX CORPORATION
Through Their Agent For Service of Process
HARRY MCCALL JR.
1100 Poydras Street
New Orleans, Louisiana 70112

CSX RAILWAY SYSTEM
Through Their Agent For Service of Process
HARRY MCCALL JR.
1100 Poydras Street
New Orleans, Louisiana 70112

CSX TRANSPORTATION, INCORPORATED
Through Their Agent For Service of Process
HARRY MCCALL JR.
1100 Poydras Street
New Orleans, Louisiana 70112

NORFOLK SOUTHERN CORPORATION
Through Their Agent For Service of Process
BENJAMIN R. SLATER, III
201 St. Charles Avenue, Suite 3300
New Orleans, Louisiana 70130

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY
Through Their Agent For Service of Process
BENJAMIN R. SLATER, III
201 St. Charles Avenue, Suite 3300
New Orleans, Louisiana 70130

SOUTHERN RAILWAY COMPANY
Through Their Agent For Service of Process
BENJAMIN R. SLATER, III
201 St. Charles Avenue, Suite 3300
New Orleans, Louisiana 70130

LOUISIANA SOUTHERN RAILWAY COMPANY
Through Their Agent For Service of Process
BENJAMIN SLATER, III
201 St. Charles Avenue, Suite 3300
New Orleans, Louisiana 70130

NEW ORLEANS TERMINAL COMPANY
Through Their Agent For Service of Process
BENJAMIN SLATER, III
201 St. Charles Avenue, Suite 3300
New Orleans, Lousiana 70130

GENERAL AMERICAN TRANSPORTATION CORPORATION
c/o C.T. CORPORATION SYSTEMS
601 Poydras Street
New Orleans, Louisiana 70130

GATX LEASING CORPORATION
Please Hold Service

GATX TERMINALS CORPORATION
c/o C.T. CORPORATION SYSTEMS
601 Poydras Street
New Orleans, Louisiana 70130

MITSUI AND COMPANY (USA), INCORPORATED
c/o C.T. CORPORATION SYSTEMS
601 Poydras Street
New Orleans, Louisiana 70130

ILLINOIS CENTRAL GULF RAILROAD COMPANY
Through Their Agent For Service of Process
L.R. RUSHING
2351 Hickory Avenue
Harahan, Louisiana 70123

PHILLIPS PETROLEUM COMPANY
c/o UNITED STATES CORPORATION COMPANY
1101 American Bank Building
New Orleans, Louisiana 70130

PHILLIPS 66 COMPANY
c/o UNITED STATES CORPORATION COMPANY
1101 American Bank Building
New Orleans, Louisiana 70130

POLYSAR LIMITED
(Through the Louisiana Long Arm Statute)

POLYSAR INCORPORATED
2603 West Market
Akron, Ohio 44313
(Through the Louisiana Long Arm Statute)

POLYSAR LATEX
2603 West Market
Akron, Ohio 44313
(Through the Louisiana Long Arm Statute)

AMERICAN MACHINE AND FOUNDRY COMPANY
Please Hold Service

AMF-BEAIRD, INCORPORATED
c/o C.T. CORPORATION SYSTEMS
17th Floor
601 Poydras Street
New Orleans, Louisiana 70130

J.B. BEAIRD COMPANY, INCORPORATED
Please Hold Service

LABORATORY SERVICE, INCORPORATED
c/o C.T. CORPORATION SYSTEMS
17th Floor
601 Poydras Street
New Orleans, Louisiana 70130

TIGER LEASING GROUP
Please Hold Service

NORTH AMERICAN CAR CORPORATION
Please Hold Service

GENERAL ELECTRIC RAIL CAR COMPANY
Please Hold Service

NEW ORLEANS PUBLIC SERVICE, INCORPORATED
Through Their Agent for Service of Process
DONALD HUNTER
317 Baronne Street
New Orleans, Louisiana 70112